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ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPT. TERM, 1827.

STATE & AL. vs. WILSON.

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any person or persons, for hire, profit or emolument, from Opelousas river to Placquemine, or from Placquemine to Opelousas river, along the route contemplated by the act of incorporation, &c.; and that the defendant kept up and maintained, a certain vessel propelled by steam, called the Dolphin, and transported persons for hire and emolument, from Placquemine to Opelousas river, and from Opelousas river to Placquemine.

The defendant pleaded the general issue and other pleas; the suits were consolidated; there was judgment in his favor, and the plaintiffs appealed.

The evidence shews, that the Dolphin made several trips from the city of New-Orleans to the place of the landing on the Opelousas river, which is one of the *termini* of the ferry granted to them by their act of incorporation, and that she necessarily passed along the route contemplated by the act of the legislature between the two *termini* of the ferry.

The privilege of the company must be commensurate with its duties; the latter consist in the transportation of persons, animals, and goods, from one of the *termini* to the other. They alone can take passengers and goods at one of the *termini*, to transport them to the

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other. But as the company cannot be compelled to transport persons or goods from Opelousas river to New-Orleans, or from New-Orleans to Opelousas river, they cannot complain if any other person do so, although such person necessarily pass along the route of the ferry established by the legislature, and granted to the company.

A different construction of the act of incorporation would give to the company the exclusive privilege of trading to or from Opelousas river, to any other part of the state, in vessels propelled by steam, without imposing on them the obligation of keeping such vessels in that trade.

The only case in which it is alleged the Dolphin took a passenger from the lower *termini* to the upper, is that of Heighmart, who is stated to have been taken at Placquemines, and got on board at the junction of Placquemine and the Mississippi, about half a mile below the mouth of the bayou, the boat having stopped to put out freight.

In all cases, principally in penal actions, the the plaintiff must clearly prove his case, and he cannot hope to succeed if he leaves it doubtful. Here the defendant contends, that

the lower *terminus* is the park, or the lower end of bayou Placquemine; that if the place where the Mississippi enters the bayou be the *terminus* then the ferry is from the Mississippi to Opelousas, not from Plaquemine to Opeloussas. Further, that the testimony leaves it doubtful whether the passengers came in half a mile below the junction, i. e. on the Mississippi, or half a mile below the junction with the bayou. To this it is urged that the testimony is, that the passenger came in at Placquemines, i. e. in the bayou Placquemines.

The spot on which a collection of houses have been erected along the Mississippi, immediately below it enters the bayou, and in which there is, or was, a post-office, is called Placquemines, and may include the banks of the river for nearly half a mile. We do not think that the evidence is so clear as to justify us from departing from a rule in which we have found much safety, to respect matters of fact, the conclusion of those who had the advantages of seeing and hearing the witnesses.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and that the plaintiff, Luke Lesassier, pay the costs in both courts.

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Ogden and *Brownson* for the plaintiffs.
Garland and *Simon* for the defendant.

DUFAU vs. *MASSICOT'S HEIRS.*

APPEAL from the court of probates of the parish of St. Marys.

An insolvent debtor does not acquire a discharge of his debts when the creditors fail to appear; or having made a change of parish, withdraw it.

In a suit to ascertain the share of one partner, all must be made parties.

PORTER, J. delivered the opinion of the court. The petitioner claims from the defendants the sum of five thousand dollars balance due on an account settled and signed by the ancestor of the defendants, and the plaintiff on the 29th of September, 1809; seventeen hundred and ninety-four dollars, seventy cents, for the third of the losses sustained in a partnership of which they were members in conjunction with one Laurent Wiltz; two thousand eight hundred and forty-four dollars, forty four cents, the one half of the petitioner's losses in the partnership, the ancestor of defendants having purchased the one half of plaintiff's interest in the concern, previous to its dissolution; and interest on a part of these claims according to an account annexed to the petition. Judgment is asked for thirteen thousand, five hundred and forty-five dollars with interest from judicial demand.

The defendants plead that their ancestor on the 24th of August, 1813, made a cession, under the act for the relief of insolvent debtors in actual custody, of all his property; and was discharged from all debts contracted prior to that day.

That he had no other accounts with the plaintiff excepting those in relation to the plantation of which they were partners, and that their accounts were settled and liquidated by a judgment of the district court of the state of Louisiana for the first district, on the 29th of June 1813, in which, I. P. Wiltz, was plaintiff, and the petitioner, one P. F. Dubourg, and C. Massicot, were defendants.

And lastly, that the plaintiff was indebted to their ancestor at his decease in the sum of three thousand dollars.

The cause was submitted to referees, who reported that the sum of $3655 64 cents, was due by the defendants, with interest on $5000 of this sum at the rate of ten per cent. from different periods at which the several instalments composing this sum fell due. The defendants appealed.

The first question for our decision is, the effect of the discharge under the insolvent laws.

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It appears from the record of the proceedings in the suit of ***Massicot*** vs. ***His creditors***, that some of them alleged fraud against him; that on his filing an answer to the charge, the allegation was withdrawn, and that the court therefore ordered, he should be discharged out of custody. These proceedings bear date the 4th of December, 1813.

On the 21st. of January, 1814, a syndic was appointed, and on the 15th of March of the same year, the insolvent took the oath prescribed by the statute, and executed an assignment of all his property to his creditors.

The plaintiff contends, these proceedings have not the effect which the defendants in their answer allege. That no judgment of the court being rendered discharging the defendant from the debts contracted by him, they yet remain in force and can be collected from him or his representatives.

The fourth section of the act under which the insolvent claimed relief, declares that in case the creditors when notified do not attend on the day appointed for them to appear and answer the claimant's demand for a discharge from the custody of the sheriff, the court shall in its discretion either release the debtor or re-

mand him until another day: and should the creditors not attend on that day and shew cause as aforesaid, the debtor *shall be discharged*, on executing an assignment in trust for his creditors; and on taking the oath herein prescribed. 2 *Martin's Digest*, 444.

This section would perhaps sustain the plea of the defendants, but it must be taken and construed with another, that precedes it, and which is as follows: "the creditors being thus duly notified shall have the right to interrogate the debtor, &c. and should the court be satisfied with the fairness and regularity of his books and accounts (if a merchant or a trader) and the documents which accompany them, and *that two thirds of his creditors in number* and value, will consent to his discharge, he shall on executing an assignment of his estate and effects, to trustees named by his creditors under the direction of the court, and on taking the oath herein prescribed, *be forever discharged from all suits and actions then pending against him, and from all manner of debts which he may before that time have contracted.*"

A clause of the 6th section of the act also requires to be set out, in order to enable us to

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present clearly the true construction which that relied on by the defendants should receive. After directing the proceedings which should be had in case the creditors make an allegation of fraud, it proceeds to declare, that if the jury find the debtor not guilty of fraud, he shall forthwith *be discharged* from the custody of the sheriff, and *from all manner of debts which he may before that time have contracted.* 2 *Martin's Digest*, 446.

The two cases then, in which the legislature have declared that the debtor shall be discharged from previous debts are: 1st. where the two thirds of the creditors consent: and, 2d where they make an allegation of fraud, and that allegation is found untrue. But no such consequence is *declared* to follow the non-attendance of the creditors and their failure to consent, or object; and it cannot be *implied.* On the contrary, the presumption is, that no such consequence was contemplated by the law maker. The section relied on merely states, that if the creditors do not attend the debtor shall be discharged, (*elargi*) that is, discharged from imprisonment. If the word *discharged* conveyed the idea that the debtor was released from his debts, there was no oc-

casion for the legislature to add after it, in the preceding, and succeeding sections, *and from all manner of debts* their using these additional terms shews that they did not consider the word, *discharged*, would have that effect. The change of phraseology, indicates a change of intention, and neither in the reason of the thing, nor in the language used, are we authorised to say that the mere non-attendance of the creditors operated a release of their debts. This view of the subject becomes conclusive when we turn our attention to the French text which at the time this statute was passed, was of equal authority with the English. The corresponding term used in it, to *discharge* is *elargi*, which means set at liberty, and does not at all convey the idea, of a release from debts.

It was urged the defendant might come under the protection of the 6th section because the charge of fraud had been made against him by his creditors. But that charge appears to have been made in error, and to have been withdrawn when that error was discovered. It is only trial, and verdict of acquittal, that produces the consequence contended for.

In regard to that portion of the plaintiff's

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claim which is founded on a balance due for the partnership affairs, we think the objection that the representatives of With should be parties, must prevail. By the decree of the district court where these matters were once liquidated, and which settled as far as was then possible the accounts of the partners, it was declared, that after debts of the firm should be paid, if any surplus remained it will go to the discharge of the common debts which the several partners may have against the joint concern. By this action it is attempted to establish what is the share of the debts due by one of the members of that firm to it, without all the partners being before the court. This cannot be done, nor is the case of the plaintiff made stronger by shewing, that since that time the other partner has been paid all claims he may have had against the firm. For it appears by the terms of the satisfaction entered on record that this amount was settled between the plaintiff and the other partner without the intervention of the ancestor of the defendants, consequently as to the person they represent these matters are still open, and all must be before the court to enable a final settlement to be made.

One of the most important questions in this case is, in relation to the interest due on the private account. By the contract of sale which forms the principal item of this account, the plaintiff sold to Massicot the one half the vendor's interest in the plantation on the same terms, clauses, and conditions, that he had acquired it. And the vendee stipulated that he would stand in his place. One of the clauses of the contract by which the vendor acquired the property was that if the payments were not regularly made, the sums due should bear interest at ten per cent. An objection has been taken that by the contract, the purchaser was to pay other persons than the seller, and that on his failure to comply with his agreement, and payment by the vendor, that he then owed to the latter, and that the interests ceased to run from that moment. But we are of opinion that though he might have discharged his engagement by paying the price to the person indicated in the act, his failure to do so cannot place him in any better situation than if by the terms of the agreement the payment was to have been made to the seller. The money was still due, and the interest was to run until perfect payment.

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It is therefore ordered, adjudged and decreed, that the judgment of the probate court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendants the sum of five thousand dollars with interest at ten per cent. on the four several instalments of $1250 each, from the time they became due; viz: from the 15th of March, 1811, the 15th of March, 1812, the 15th of March, 1813, and the 15th of March, 1814, with costs in the court below, those of appeal to be paid by the plaintiff: reserving to him the right to assert his claim in relation to the partnership concerns in a suit where the partners or their representatives are parties to the suit.

Brownson for the plaintiff, ***Simon*** for the defendants.

COLLINS & AL. vs. *ANDREWS.*

A contract, by which a tutor agrees to pay interest on a claim due by the minor, on being allowed a longer term of credit, is not void, but voidable.

APPEAL from the court of the fifth district.

MATTHEWS, J. delivered the opinion of the court. This suit is instituted to compel the defendant to render an account of his management of the succession of Luke Collins, as

agent of the plaintiffs, with the power and privileges of a curator. The accounts by him rendered, with evidence to support them, were submitted to referees, whose report was adopted by the district court as the basis of its judgment, and being in favor of the defendant, the plaintiffs appealed.

And if the minor is not injured by it, the contract will not be set aside.

Several exceptions were filed against the statement made by the referees, which were overruled by the court below. The objections to the report were founded on matters of fact; and as the facts of the cause do not come up on the record, they cannot be regularly noticed by this court.

It is the duty of an agent to prove those facts which will discharge him from responsibility in not collecting debts put into his hands for collection.

The case presents two principal questions of law. The first relates to the legal effects of an instrument of compromise and mortgage entered into by the widow on her own account, and that of the heirs of her deceased husband, as their tutrix by nature, with the creditors of the estate. By the provisions of this act, time was allowed for the payment uf the debts, and a mortgage taken on the property of the succession to secure their payment, according to the terms agreed on, together with interest and damages which might result from non-performance on the part of the obligors.

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The second question arises out of a failure on the part of the defendant to collect a part of the debts due to the succession, resulting from a sale of the property thereof, effected for the purpose of making payment to its creditors.

There is also a subsidiary question as to the right of the creditors to recover interest, after full and final payment to their agent of the principal debts.

Previous to entering into the consideration of these questions, it is proper to give a short history of the case: Luke Collins died owing considerable debts to several persons; at the time of his death, it seems to have been considered that his succession could not have been sold, unless at a price less than its real value; and for this reason, his widow, in her own right as a partner in acquests and gains, and as tutrix of her minor children, entered into the agreement above stated with the creditors of the community. Having failed to meet the payment of the sums therein stipulated, on the terms prescribed, the property of the succession was sold by the consent of all persons concerned therein, widow, heirs and creditors: and the defendant was appointed by the widow

and heirs to collect the amount for which the property sold on certain terms of credit, and was also empowered by the creditors to receive and hold the money thus collected in discharge of their claims against said community or succession.

As to the first of these questions, proposed arising out of the act of mortgage made in favor of the creditors by the widow of L. Collins, so far as it affects the rights of her minor children, considered exclusively as a compromise respecting their rights, being entered into without the authority required by law, it was perhaps null and void, *ab initio*. *See Old Civil Code, p.* 70, *art.* 65 *&* 10. *Martin*, 726. But a tutor may pay the debts of a succession under his management, and in rendering an account of the position of his affairs to the heirs, such payments would certainly be properly placed to his credit. In the instance before the court, the tutrix, by agreement, prolonged the time of payment, evidently with the intention of benefitting her minor children by preventing a sacrifice of their father's estate, and her own property as partner in the community.

The act, it is believed, may be viewed as one entered into by the tutrix in relation to the pay-

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ment of debts, justly owing and due, from the succession of the intestate; thus viewed, it is not absolutely void, but only voidable, on shewing injury to the minors.

Now the facts of the case, so far as exhibited by the record, shew that no damage occurred to the estate of the minors, in consequence of the postponement of the payment of the debts due from the inheritance. Time was obtained on condition of paying legal interest, on failure of payment at the periods stipulated in the contract; opposed to such interest, was the probable profits of the estate, until it was sold, which may fully be presumed to have equalled the rate of interest payable on the debts. *Febrero, p.* 2, *lib.* 2, *cap.* 3, *s.* 2, *Nos.* 61, 62, & 63.

In relation to the right of the creditors to recover interest, the principal being satisfied, it suffices to observe, that the whole amount, both principal and interest, of their claims having been paid into the hands of their agents; if the interest were legally due at the time the money was thus received it was imputable to the payment of interest, which was consequently paid simultaneously with the principal.

The second question is in relation to a bill of exceptions taken to the opinion of the judge *a quo*, by which he required the plaintiffs to prove negligence on the part of the defendant in not recovering two debts, amounting to 880 dollars, due to the succession of L. Collins. The authorities on this subject have the appearance of variance; but we are inclined to think the court below erred in throwing the burthen of proof on the plaintiffs. It is, in our opinion, incumbent on the defendant to shew the occurrences which prevented him from collecting the sum of 740 dollars from Ligot, and 140 dollars from Moore; or, in other words, to shew due diligence. *See* 11 *Martin*, 190 *& Seq.*

As the defendant may have been prevented by this erroneous opinion from proving his diligence in endeavoring to collect these sums, it is proper to send the cause back for a new trial.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and that the case be remanded for a new trial, with instructions to the court below to require the de-

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fendant to prove diligence: and the appellant pay costs of appeal.

Todd and *Simon* for the plaintiffs, ***Brownson*** and ***Bowen*** for the defendant.

DOUCET vs. *BROUSSARD & AL*

APPEAL from the court of the fifth district.

It is not essential that a parish judge should state in an act that he is *ex-officio* notary public.

In a donation to one of the spouses, in a contract of marriage, the posterity of the donee, not proceeding from the marriage, can not take

That person is to take as heir, who is such at the opening of the succession.

PORTER, J. delivered the opinion of the court. This case presents no questions of fact; those of law which arise on it, grow out of the clauses contained in an act passed between the father of the plaintiff, and his step-mother Francoise Martin, both of whom are now deceased.

Previous to their marriage, they made, by public act, an agreement, in which it is stated, "that Francoise Martin, out of good love and affection to Jean Pierre Doucet, inhabitant of the Parish of St. Landry, acknowledges and declares, by these presents, to make a full and entire donation of the whole of her property moveable and immoveable, unto the said Jean Pierre Doucet, to hold the said property, and every part thereof, after her decease, to his only proper use and behoof. However, in case

the said Jean Pierre Doucet should depart this life before the donor, she acknowledges and declares, by these presents, and it is her wish and intention, that this donation should have its full force and effect in favor of Pierre Doucet, the son of the aforesaid Jean Pierre Doucet."

After making some exceptions in favor of her heirs, and of one Ursin Broussard, who is also a party to this suit, the act proceeds to state, "the conditions of this donation are such, that whereas, the said Francoise Martin is about entering into the bonds of marriage—now, if by this marriage she should have any children, then the present donation, and every thing therein contained, shall be null and void, for her intention is not to deprive her children of her inheritance, or any part thereof."

The marriage contemplated at the time the act was entered into took place, and terminated by the death of the husband, Jean Pierre Doucet, without any children having proceeded from it. Sometime after its dissolution, Francoise Martin intermarried with one Joseph Savois, and the marriage was dissolved by her death. Previous to her decease, she made a disposition of her property by last will

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and testament, in which she gave to her husband the use and enjoyment of her estate during his life, and, at his decease, directed, that after certain legacies were satisfied, which need not be stated in detail, the rest of her property should go to such of her heirs as were capable of inheriting from her.

At her decease she left a sister, who was married to one Francois Breaud: by their marriage contract it was provided, that in case he survived her, he should be entitled to the whole of her estate; this sister died previous to the death of Savois, the husband.

The parties before the court are, first, the plaintiff, Doucet, who, in virtue of the stipulations entered into by the marriage contract with his father, claims the whole of the estate: the executor and legatees of the will, who insist on its validity, and contend that the donation to the plaintiff was null and void: and lastly, Francoise Breaud, and the more remote collateral relations of the testatrix, who contest the right to the residuary portions given by the will to her legal heirs. Breaud's claim is in the right of his wife, who, he avers, was the nearest relation at the time the succession was

opened. His adversaries reply, that it was not the nearest relation at the time of the testatrix's decease the property was bequeathed to, but the most capable of inheriting at the death of Savois; and that the sister having died without issue before him, the property belongs to them.

The first question for our decision is presented by a bill of exceptions. The plaintiff on the trial, offered in support of his claim, the act which has been already set out, and its reception in evidence was objected to, because it purported to be made before the parish judge, without any statement in the instrument that he was *ex-officio* notary public. The judge of the first instance overruled this objection, and we are of opinion, correctly. It is one of the most technical kind, relying for support on *the letter that killeth*, rather than *the spirit that giveth life;* and it cannot be sustained even by the principles on which it was advocated. The law having expressly made the parish judge *ex-officio* notary public, the latter appellation makes no part of his style of office. It is attached to, and follows that of judge, when acting in a notarial capacity, and

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consequently, there was no necessity for setting it out in the act.

The second, and by far the most important question in the cause, arises out of the instrument passed between the father of the plaintiff, and Francoise Martin. The validity of the donation thus made, depends on the true and proper construction which several textual provisions of our law should receive.

The 211th article of the old code, under which the agreement was made, provides, that "fathers and mothers, the other ascendants, the collateral relations of either of the spouses, and even strangers, may give the whole, or a part of the property, they shall leave on the day of their decease, both for the benefit of said spouses, and for that of the children to be born of their marriage, in case the donor survives the spouse donee."

"Such a donation, though made for the benefit of the spouses, or of one of them, is always in the aforesaid case of the survivorship of the donor, presumed to be made ***for the benefit of the children or descendants***, to proceed from that marriage."

The 217th article of the same work declares, that "donations made to one of the

spouses on the terms of the articles 214 and 213, fall, if the donor survives the donee, and *his or her posterity.*

These articles are taken verbatim from the 1082d and 1089th articles of the Napoleon Code, and a good deal of research has been exhibited to shew what construction these provisions have received in the country from which we received them. The weight of authority appears to us decidedly in favor of the ground assumed by the defendants. There are some writers, it is true, who think differently, but on the other side are found the greater number, and among them, those names which have rendered the modern jurisprudence of France, familiar to foreign nations. *Paillette on the* 1089*th art. of Nap. Code*; *Merlin Rep. de juris. verbo, institution contractuelle*, *s.* 12, *No.* 9; *Toullier*, *vol.* 5, *lib.* 3, *tit.* 2, *cap* 8, *No.* 842; *Grenier*, *vol.* 2, 29.

It is true as has been urged by the counsel for the plaintiff, that the expressions in the 217th article, *his or her posterity* authorise an interpretation, which would enable the children of the donee to take, although they might not proceed from the marriage; and it is true, there is no such provision in the Napoleon

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code, as that found in ours, that where the law is clear and free from all ambiguity, the letter must not be disregarded, on pretence of pursuing its spirit. But it is precisely because we feel that it is not clear and free from all ambiguity, that we are obliged to look beyond the mere literal import of the terms used in it. If each article of our code was construed singly, without reference to others which treat of the same subject, we would have the legislature in many cases, doing what they are never presumed to do, that is, enacting contrary provisions on the same subject matter.

The two articles of our code already cited when brought in juxta position, satisfy us that the jurists of France have wisely interpreted them. The first declares, that donations of this kind are always presumed to be made for the benefit of the children of the marriage. This declaration is wholly irreconcileable with the idea, that on failure of children of the marriage, they are to benefit the children of the donee by a former one. Such construction would make the 211th article of no force. But by limiting the word *posterity* to the offspring of the marriage, both are left with effect; the 217th, it is true, somewhat restricted, but this is

preferable to making a dead letter of the other.

This view of the subject disposes of the question raised by the express gift made to the plaintiff, considering him as a stranger, and incapable of being benefitted by the contract entered into, in relation to the marriage; then the donation can be considered in no other light but as one *mortis causa*, and it wants the formalities necessary to give it effect as such. One of the principal reasons given by the jurists of France for construing the word *posterity* in a restricted sense is, that the donor could not give to the children of a former marriage by name, and that it would be permitting that to be done indirectly, which could not be done directly, to allow them to take as children of the donee. *See Pailette: Merlin, loco citato.*

As to the question raised between Breaux, representing the rights of his deceased wife, and the more distant collateral relations, it has not created the slightest difficulty in our minds: it is most clearly the nearest heir at the time of opening the succession that the bequest is made to, not those who should become so af- the death of her husband.

It is therefore ordered, adjudged and de-

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creed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiff, *Simon, Bowen & Markham* for the defendants.

LANDRY vs. *BROUSSARD.*

No appeal lies from the allowance of improper exceptions to interrogatories.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. The defendant sued for the payment of the price of a tract of land, pleaded, that the plaintiff and he had subsequently agreed to rescind the sale, and he annexed interrogatories to the answer, by which the plaintiff was called on to state, whether or not such an agreement had been made.

The plaintiff excepted to these interrogatories because it was no where alleged in them, or in the answer of the defendant, that the property had been delivered, and that without delivery, no such interrogatories could be put in relation to immoveable property. *C. Code, no.* 2255.

If the case was before us in such a shape, that the question here raised could be gone into, the exceptions would perhaps be found to have

been prematurely taken. They would rather seem to belong to observations *on* the evidence, than be an objection to the plaintiff's answering; for *non constat* that the defendant might not have proved the delivery by other testimony. If he failed to offer that proof, or if it could not be received by a want of proper allegations in the answer, the exceptions would belong to another stage of the cause.

But we express no decided opinion on this point, for the case is not such a one as we can take cognizance of at present. It is not every erroneous decision of the inferior courts that will authorise an appeal to this. The judgment or order must be such as may work an irreparable grievance, or in other words it must be one that cannot be remedied after final judgment. Admitting therefore that being compelled to tell the truth is a great grievance to the plaintiff, we cannot consider it an irreparable one. Any injury he may sustain from it can be corrected after the case is finally disposed of below.

It is therefore ordered, adjudged and decreed, that this appeal be dismissed with costs.

Simon for the plaintiff, *Bowen* for the defendant.

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RAWLE vs. *FENNESSEY.*

A party to anact cannot allege its simulation when he has no counter letter.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This case presents but one question, and that is whether a party to a public act who has not a counter letter, can be permitted to prove that it was feigned and simulated. It is clear he cannot, and it is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

I. L. & J. Baker for the plaintiff, *Lesassier & Bowen* for the defendant.

LABOLAIS vs. *BERNARD.*

A party who has agreed to pay damages for a trespass on the plaintiff's land, cannot allege his error as to the title of the plaintiff without proving it

APPEAL from the court of the fifth district.

MATTHEWS, J. delivered the opinion of the court. This action is founded on a written promise of the defendant to pay to the plaintiff the sum of 305 dollars: judgment was rendered in favor of the latter in the district court, from which the former appealed.

The promise, as it appears from the evidence of the case, was made in consequence of

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a transaction which took place between the parties to the suit, relative to timber which the defendant had taken from the land of the plaintiff. The defence set up against the right of recovery, is error in the transaction or compromise. The appellant alleges that the land from which he took the timber is not the property of the appellee. He certainly recognised it as belonging to the latter by the compromise, and we are unable to discover any evidence on the record which shews that this recognition was made in error.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiff, *Markham & Simon* for the defendant.

COLEMAN & AL. vs. *BREAUD.*

APPEAL from the court of the fifth district.

A copy from a register's office in another state, does not dispense with the production of the original deed.

MATTHEWS, J. delivered the opinion of the court. The record in the present case contains a history of the proceedings in two suits which were consolidated and in that shape

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tried in the court below; one commenced by Coleman and Nelson, claiming to recover from the defendant certain slaves, to which they alleged title in themselves, supported by a deed of trust from one Barfield; the other brought by said Barfield, in which he claims the property, as legally belonging to him. There was judgment in the district court for the defendant, and the plaintiffs appealed.

When the record does not shew the law that regulates contracts entered into abroad, the court tests them by the laws of this state.

The first evidence offered in support of the claim of the trustees is a certified copy of the deed on which they rely, taken from a recording officer in the state of Tennessee. The introduction of this piece of evidence was opposed by the counsel for the defendant, on two grounds, 1st. As not having been certified according to the provisions of the act of congress made for such cases: 2d. Because the original deed was not accounted for. The opposition was sustained by the court below, and a bill of exceptions was taken on the part of the plaintiffs. We are of opinion the judge *a quo* acted correctly in rejecting the evidence in the shape in which it was offered: the original deed should have been produced or its loss, or some other circumstance proven, shewing it out of the power of the appellants.

Many attempts were made to obtain the testimony of witnesses by depositions, to support the claim of the plaintiffs; all these were rejected by the district court, as having been illegally taken; we have examined the bills of exception, which relate to the opinions of the judge *a quo*, by which he rejected the testimony, and believe that they are correct in every instance.

The claim of the trustees is wholly unsupported by evidence, and must therefore be dismissed without comment. The only testimony found on the record in support of Barfield's title to the slaves in dispute is that of two witnesses, Meltz and Hudgens. They prove that the plaintiff held the negroes in possession in the territory of Arkansas, and delivered them to one Haralson, under whom the defendant claims title, to be brought to the state of Louisiana, and hired out for the benefit of the pretended owner. The jury to whom the case was submitted seem by their verdict to have to have discredited this story about the hiring; and if the case were to be governed by laws which authorise the transfer of slaves by parole, in pursuance of this verdict, the title might be presumed to have accompanied

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the tradition to Haralson, which he has regularly passed to the defendant.

But as there is no evidence in the case which shews that it must be governed by foreign laws and the provisions of those laws on the subject, it is properly to be subjected to the influence of the laws of Louisiana: and according to the principles therein contained, possession is not evidence of title to slaves, for they must be transferred by written evidence of title. It is true, that there may be exceptions to the rule established by our laws, *e. g.* in relation to the offspring of female slaves born while in possession of the masters.

In the present case the plaintiff Barfield, does not bring himself within any exceptions to the rule, and consequently, has shewn no title to the property claimed in his petition.

The whole circumstances of the case so far as disclosed by the record, do not in our opinion call for the interference of this court, to reverse the judgment of the district court and to enter one of non-suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baker for the plaintiff, *Simon & Brownson* for the defendant.

MILES vs. *ODEN & AL.*

If the plaintiff proceed to final judgment without the defendant having answered, and without having taken judgment by default, the final judgment will be set aside.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This case commenced by attachment, and proceeded to final judgment without any answer being put in by the defendants or judgment by default taken against them. As the *contestatio litis* was not formed by the pleadings, the proceedings were irregular and the cause must be remanded.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the case be remanded to be proceeded in according to law, and that the appellee pay the costs of the appeal.

Brownson & Baker for the plaintiff, *Bowen & Simon* for the defendants.

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RIZAT & AL. vs. *PONSONY.*

The district court is without jurisdiction in a suit to compel a tutor, whose office is expired, to account and pay the balance in his hands.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This action was instituted in the district court to compel the defendant whose office of tutor was stated to have expired, to render an account and pay over the moneys in his hand. The judge below dismissed the suit on the ground that the court of probates had exclusive jurisdiction of the case. With this opinion, we conceive, after the repeated decisions of this court, the question cannot be remanded as an open one.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the plaintiffs, *Simon & Garland* for the defendant.

M'DONOGH vs. *ROGERS.*

No appeal lies from an order to answer interrogatories.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. This appeal is taken from the opinion

of the court directing the plaintiff to answer certain interrogatories, propounded to him in the defendant's answer. Delay is the only injury which the plaintiff may sustain from the error of the judge, after his answer is put in, it will be disregarded if he was improperly ordered to answer, and probably, the final judgment of the cause will be further postponed by the appeal, than by a compliance with the order to answer. The apoeal appears to us premature.

It is therefore ordered, adjudged and decreed, that it be dismissed with costs.

Simon for the plaintiff, *Lesassier*, *Bowen & Garland* for the defendant.

LATIOLAIS vs. *RICHARD.*

APPEAL from the court of the fifth district.

The bare circumstance of location can give no additional force to a claim in opposition to another originally stronger by its age and locality.

MATTHEWS, J. delivered the opinion of the court. The present case presents a dispute concerning four arpents of land fronting on the bayou Vermillion, with the ordinary depth of forty, situated in a place called the Mauvaise prairie. The plaintiff obtained judgment in

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the court below, from which the defendant appealed.

The evidences of title adduced on the part of the former, shew that he had acquired a right to eighteen arpents front on the bayou above stated, with the ordinary depth. The defendant shews a title to twenty arpents front, &c. on the said bayou.

The operations of surveyors cannot derogate from claims to land recognised by the proper officers of the U. States.

Surveys of the claims of both parties are exhibited, purporting to have been made by a surveyor of the United States, in pursuance of certificates of confirmation issued by the land commissioners, and under orders of the principal deputy surveyor for the western district of the state of Louisiana, &c. Some time after the return of the survey made for the plaintiff, to the office of the principal deputy surveyor, and subsequent to his approval of the same, he (the plaintiff) disapproved of the manner in which his land had been located, as not being in conformity with his original titles.—These titles are supported by two *requetes* and orders of survey, one in favor of a person named Zerringue, and the other of Provost, who acquired the right of the former and transferred both it and his own to the appellee.—The title or rather claim of Zerringue,

calls for the land of Fusillier, above on the bayou, and vacant or unappropriated land below. The *requete* of Provost requires as limits of the land petitioned for, the boundary of one Carrier below, and that of Zerringue above. The surveys of these claims were made for the benefit of the plaintiff under the inspection and instructions of his agent Francois Carmouche, (who figures as a principal witness in the cause) and were executed in such a manner as to unite them by limiting the lower on the line of Carrier, and running up the bayou for the quantity of eighteen arpents, the whole amount required to fill their measure. Thus executed, the extent of both the surveys (as it appears by the evidence of the cause) did not reach the limit of Fusillier's land, nor did that made under Zerringue's claim, include a field which he had cultivated, although it seems to have included the sight of his building at no great distance from the centre of the eight arpents as surveyed. Some time after the plats of survey, made in the manner and under the circumstances above stated, the defendant caused his claim to be located adjoining the upper limit of the plaintiff's land. These are the most important

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facts, necessary to be noticed in the decision of the cause; and from which a sole question arises, whether the plaintiff can legally be permitted so to alter the location of his claims in such a manner as to recover from the defendant the land in dispute.

According to the whole evidence of the case no doubt can be entertained of the preference to which Zerringue's claim was entitled over that of the defendant, in its location, and that consequently the plaintiff who is now the proprietor thereof, might have caused it to be placed in such a manner as to have embraced the land claimed in the present suit.

It is believed that the alteration required by him ought to be permitted unless it has a direct tendency to invade the rights of the defendant legally acquired and vested. We must therefore inquire into the title set up in his defence. This is similar to that of the plaintiff, except that it is a later date and did not call for the place in which it has been located. The bare construction of its location can give it no new or additional force in opposition to a claim stronger originally by its greater age and definite locality. The operations of the surveyors ought not to be allowed to add to or derogate

from rights and claims of individuals, to land as recognised by the proper officers of the government of the United States. The order of the principal deputy surveyor, in pursuance of which the claims of the defendant seems to have been located, cannot impair the right of the plaintiff. The surveys made and returned by Johnston, the deputy surveyor, apparently executed under the directions of an agent authorised by the appellee and acquiesed in by the latter for some time, may be considered as having been made in error, and ignorance of facts, which would have justified him in requiring a different location of the claim derived from Zerringue, and such as he now insists on.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be affirmed with costs.

Brownson for the plaintiff, *Simon & Markham* for the defendants.

PERRY vs. *FRILOT.*

APPEAL from the court of the fifth district.

PORTER J. delivered the opinion of the court.

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PERRY *vs.* FRILOT.

The promise of a father to pay part of the debt of his insolvent son, to a creditor, (who alleges fraud in the insolvent, and threatens a prosecution, and promises to procure a discharge from the creditors, on being secured) without a good consideration & void

This case presents a single question, but it is one which has arisen for the first time in this state, and it is of considerable importance.

The son of the defendant was indebted to the plaintiff and became insolvent. After the filing of his bilan, or immediately previous thereto, the plaintiff called on his father and told him that his son had acted fraudulently in his failure, and that unless he, the father, would pay a proportion of the debt due the plaintiff, he would prosecute the son criminally ; but, if the defendant would comply with the demand, the plaintiff would obtain a discharge from the other creditors, and give his own.

It appears clearly, from the evidence, that the defendant, influenced by these menaces, and moved by parental affection, gave his three several notes to the plaintiff, payable at different times, for $800 each ; that these notes were afterwards surrendered and in lieu of them, the three obligations, given, on which this suit is brought.

The defendant sets up, as a defence to the payment, the illegality of the consideration ; he asserts the notes to be null and void.

The evidence does not shew whether the conduct of the son was fraudulent or not. But

the want of proof on this head cannot affect the conclusion to which our duty requires us to come. If it *was not* fraudulent, the plaintiff practised a gross fraud and deception on the defendant. If it *was* fraudulent, he cannot make the promise to conceal that fraud the basis of an action in a court of justice. The consideration was immoral, and society cannot lend its aid to enforce obligations entered into in contravention of those regulations which have for their object the enforcement of a great purpose of public policy. The rules established by the legislature in relation to insolvent debtors are intimately connected with private faith; public morals; the maintenance and extension of that commerce which must rest, in a great measure on credit; and that confidence which man can repose on his fellow man. Their end is two-fold—to protect and relieve the unfortunate, and to punish the fraudulent. The consideration held out by the defendant to the plaintiff for these notes, was a promise to defeat the latter purpose. Not only did he engage to be inactive and remain silent where his duty as a citizen required him to speak out, but he promised he would get the other creditors to sign; that is, that he would deceive them.

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and deceive his country too, which punishes with infamy, and the pains and penalties attached to perjury, the debtor who acts fraudulently in making a surrender of his effects. The defendant's counsel has read from English and American reports to shew, that in cases like this, courts of justice have refused to enforce obligations made in contravention of the policy of their bankrupt laws. They go the whole length for which the appellant contends. But we do not rest our judgment on them. The principles which repel the action are in our own law. They make a part of the very elements on which society is formed. An obligation with an unlawful cause, says our code, can have no effect. The *cause*, says the same work, is illicit when it is forbidden by law, when it is contrary *bonos mores*, or to public order. That the cause of the obligation on which this suit was brought was such, not a doubt exists on our minds. *C. Code*, 264, *Arts.* 31 *&* 33; *Acts of the Leg.* 1817, 136, 21; 3 *Caines*, 212; 3 *Durnford & East*, 17; 9 *Johnson*, 295; 12 *Ibid.* 306; 2 *Durnford & East*, 763.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Brownson for the plaintiff, *Baker* for the defendant.

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POLICE JURY vs. *REEVES.*

APPEAL from the court of the fifth district.

If land be given, on condition that the public buildings of the parish be erected thereon, it reverts to the donor, on the seat of justice of the parish being moved to another spot.

But the police jury may remove the buildings they erected thereon.

PORTER J. delivered the opinion of the court. In this case, the persons under whom the defendant claims, made *sous seing privé*, a proposition to the parish of La Fayette that if the commissioners of the parish "should come to the decision of fixing the court-house somewhere near the Vermillion Bridge, upon the land of the donors, they would each make a donation of two superficial arpents of land." The commissioners accepted the offer, and the donation was made by public act, on the conditions stated in the instrument under private signature. The erection of the public buildings was commenced by placing a jail on the property given.

By an act of the legislature passed subsequent to this contract, the right of fixing the seat of justice was vested in the inhabitants of the parish, to be decided by the majority of votes. Their decision was that it should be removed from the place fixed on by the commissioners.

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The petition sets out the plaintiffs' case at great length; states that their title to the property is complete, by the act of donation; avers that the defendant has taken forcible and illegal possession of the premises; prays that they may be quieted in their title, and that if their title be not good, that they may be at liberty to remove the jail.

The answer of the defendant sets up various objections to the plaintiffs' right of recovery, asserts a title to the property claimed, and states, that the donation being made on the condition that the seat of justice should be fixed on the land of the donors, the removal to another place rendered the donation void and of no effect.

The judge who heard the cause was of opinion and so decreed, "that the plaintiffs should be quieted in their title and possession, of the lot of ground claimed by them and the edifices erected thereon—that the defendant be enjoined from interfering in the full enjoyment of the same or the removal of the public prison, and that the defendant pay costs; without prejudice, however, to any claim of the defendant to recover back the lot according to the conditions of the donation, if the police-jury should remove the prison from the same."

We are of opinion this decree is erroneous. The case is one of the utmost simplicity.

The donation being made on the condition that the court-house should be placed on the land given, the removal of the seat of justice to another place, dissolved the contract, and gave a right to the donors, or their assignee, to take back the property given. *C. Code*, 274, *art.* 83.

But the buildings being placed there in good faith, the parish had a right, either to have the materials, or the price, as the defendant may choose. *C. Code*, 104, *art.* 12.

The decree, reserving to the defendant, the right to annul the contract by suit, in case the jury should remove the jail, is founded on two errors, one of fact, and one of law.

Of fact, in supposing the placing of the jail there was the condition of the gift, whereas, by the terms of the contract, it was the *court-house* that was to be fixed on the land given. If the words of the donation had even been *public buildings*, we should have come to the same conclusion, for it is not to be supposed that any man in his senses would make a donation for the purpose of having a jail placed at his door, though he might well be presumed willing to

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give a part of his land that the rest might increase in value, by having the seat of justice fixed at it, and the town erected thereon, which would necessarily grow around the place where all the inhabitants of the parish were so often compelled to assemble.

Of Law, in deciding, that in case the plaintiffs should put in execution the decree rendered in their favor, the defendant should have a right of action against them. Such circuity of proceeding is unknown to our jurisprudence. If the execution of the judgment conferred a right of action, it furnished the best possible reason why it should not have been rendered. It is true our code declares that the dissolving condition which is always understood in synallagmatic agreements in case of either party failing to comply with his engagement, does not dissolve the contract of right—that the dissolution must be sued for at law. But where, from the situation of the parties before the court, the plaintiff seeks to do something contrary to his agreement, the defendant may well offer that agreement as a defence; though, if the former had done it without the aid of the law, the latter might have been obliged to sue for a dissolution of the contract. It is doing a vain thing

for a tribunal to give a decree, which, by its very language, is to be the foundation of another suit. It is sowing the seeds of litigation instead of cutting it down.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the donations to the plaintiffs of the property mentioned in the petition, be annulled and avoided, and that the defendant be quieted in his title and possession to the same; and it is further ordered and decreed, that unless the defendant, within sixty days from the rendition of this decree, pay to the plaintiffs the value of the materials of the buildings erected by them on his land, that they have liberty to enter thereon and remove the same. It is further ordered, adjudged and decreed, that the defendant pay costs in the court of the first instance, and the plaintiffs those of appeal.

Simon and *Bowen* for the plaintiffs, *Brownson* and *Davis* for the defendant.

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JUDICE'S HEIRS vs. *BRENT.*

The plea of the general issue is waived by that of payment.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The defendant resists the claim of the plaintiffs to the price of a tract of land sold him by their ancestor, on the plea of the general issue; the invalidity of the act of sale, which is under private signature, and does not appear to have been made in the requisite number of originals; a deficiency in the number of arpents; he also offered a claim to a set-off or compensation, and claimed credit for a partial payment. The plaintiffs had judgment, and he appealed.

He has first drawn our attention to a bill of exceptions to the opinion of the district court, who rejected oral testimony of the adverse title of a person who, it is said, justly claims a considerable portion of the premises.

We think the district court did not err, as it was not charged that there was any eviction or suit.

On the merits, the plea of the general issue is waived by the plea of payment; and the admission that a sale took place resulting from this plea, the claim for a deficiency in quanti-

ty, the consequent admission of possession under the sale, afford evidence, which, added to that which *prima facie* results from the act, sufficiently strengthen and validate it.

It is not contended that the tract sold to the defendant does not physically contain the quantity of land sold, but that a third party has a better title to a part of it than the vendor, and is consequently in civil possession of it. Did this title extend to the whole tract, the circumstance would not authorise the vendor to retain the price; therefore the partial claim cannot enable him to demand a reduction.

The court disallowed every part of the compensation or set-off claimed, being of opinion it was not proven or was barred by prescription.

The account offered by the defendant is composed of three items.

The first is of $500, claimed for professional services during five years, from Oct. 20th, 1813, to the same day, 1818, at $100 per year. A contract is proved, but the court sustained the plea of prescription, and disallowed the item.

According to the act of sale, the defendant became a debtor of one half of the price on the last day of March 1820. At that period, the

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annual claim of $100 for his services, due on the 20th of October, 1814, 1815, and 1816, was barred by the plea of prescription of three years; *Morse* vs. *Brand*, vol 2. But the claims payable on the 20th of Oct. 1817 and 1818 anihilated for $200 the claim of the plaintiff's ancestor for the first half of the price which became due on the 20th of October 1820.

The second item in the account is totally unsupported by evidence, and was correctly rejected.

The third item is for $150, the price of a horse sold by the defendant to the plaintiff's ancestor.

They contended he purchased that horse, as agent for his sister-in-law, Pelagie Chretien; but this allegation is unsupported, or rather contradicted by the testimony.

The witness attests the purchase by the plaintiff's ancestor, and states his belief that the animal was for this lady. He does not say that this circumstance was mentioned at the time of the sale, nor does he give the ground of his belief. We think this item was erroneously rejected.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be annulled, avoided and reversed, and that the plaintiffs recover from the defendant, the sum of eighteen hundred and fifty dollars, with interest at five per cent on seven hundred and fifty dollars from the 31st of May, 1820 to the same day, 1821; and from this last day till payment on the whole sum, with costs in the district court; but that they pay costs in this court.

Baker for the plaintiffs, *Simon* for the defendant.

ERWIN vs. *FENWICK*.

Damages cannot be claimed, on a contract to deliver slaves, till the party is *in delay*, altho' the day of delivery be fixed by the contract

The putting the debtor *in delay* is a condition precedent to recovery, and need not be pleaded in defence.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This action is brought on an agreement entered into in writing, between the plaintiff and defendant, by which the latter promised and obliged himself to deliver at the principal plantation of the former, in the parish of Iberville, twenty slaves, ten of whom were to be males, and ten females, for the sum of ten thousand dollars, payable in notes of the plaintiff, at one and two years.

The petition charges, that the defendant has failed to comply with his agreement; avers that

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the petitioner was ever ready and willing to perform his part of it; and states the damages at nine thousand dollars.

The answer sets up several grounds of defence, which do not require to be set forth particularly. The issues joined between the parties were submitted to a jury who found a verdict in favor of the plaintiff for $500. The defendant appealed.

It has been contended in this court, as it was in that of the first instance, that no damages were due to the plaintiff for the breach of the agreement until the defendant was in default (en demeure) by a judicial interpellation, or some act equivalent thereto; that this is an indispensable act on the part of the obligee of a contract for the delivery of a specific thing, before any claim can be made for non-performance; and that until it is done, the obligor has the legal right to discharge his contract by a specific performance, though the time should have elapsed within which it was to be discharged.

With the exception of the case of *Bryant* vs. *Cox*, which went off on another ground, this is the first time in our experience that such a defence has been offered, though the cases in

which it might have been made have frequently presented themselves. It is one which cannot but be felt to have but little relation to the merits of the case, and not likely to promote its equity. Yet so clear and positive is our legislation on this subject, that we have been compelled, though slowly and reluctantly, to come to the conclusion that it must prevail. *Vol.* 3, *N S.* 574.

The doctrine on which it rests, like most of the others in our jurisprudence, had its origin in the Roman law. In that system, however, it was limited in such a manner as to meet, in general, the intentions of the parties, and was entirely conformable to reason and common sense. It was confined to those cases, where, by the terms of the contract, no particular time was fixed for the performance, and the necessity of calling on the obligor before there was, in the eye of the law, a breach of his agreement, arose from the consideration that it was presumable it was to be discharged at the demand of the obligee, and not before. From Rome, this principle was carried into France, where it was extended to all agreements, whether a certain period was fixed for discharging them or not. The utility and wisdom of such regu-

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lations are certainly not obvious to this court. But, considerations of this kind belong to that branch of the government which makes laws, not that which expounds them. Our legislature have adopted, in its entire extent, the rules which are established in France, and we have no alternative but to enforce them. *Toullier, vol.* 6, *lib.* 3 *cap.* 3, *no.* 241.

This contract took place under the dominion of the old code. The 46th article of that work, page 268, declares, that "damages are due *only* when the debtor has delayed (*est en demeure*) to fulfil his obligation; except, however, when the thing which which the debtor had obliged himself to give, or do, could have been given, or done, only at a certain time, which he has suffered to elapse."

This article, if it stood alone, would certainly leave it open for construction to say when the debtor was *in delay* in not performing his contract; and the most obvious interpretation would be, that he was so when the contract had prescribed a fixed period for performance, and that period was suffered to elapse without the obligation being fulfilled.

But the law-maker has been careful to exclude any such meaning being attached to these

expressions, for in another article it is stated, that "the debtor is considered *as having delayed* (*constitue en demeure*) *the delivery*, after he has been required to deliver, either by summons, or by any equivalent act, or by the effect of the agreement, when it is stipulated, that without the necessity of any act but by the mere expiration of the time fixed, the debtor shall be in default." *C. Code*, 266, *art.* 39.

If, therefore, damages are only due from the time the debtor is placed in default, (*en demeure*) and he be not in default until summoned or called on to perform by some equivalent act, the conclusion is irresistible, that in a case such as this, where he has not been so placed, no damages can be recovered.

The laws of Spain put the debtor *en mora* from the day the agreement was to be fulfilled, without requiring any act on the part of the creditor. It occurred to us that these provisions might come within a rule we have often applied to the construction of our code, that subsequent laws do not repeal former ones by containing different provisions on the same matter; that they must be contrary; that the re-enacting general provisions existing in our former laws, and inserting them in our code did

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not repeal the exceptions which attended these provisions in the system from which they are taken. *Curia Phillipica, lib. 2, cap. 7, Verbo Page no. 7.*

But this rule cannot benefit the plaintiff in the instance before us, for the mode pointed out by which the debtor is placed in default, is not only different, but contrary, to that prescribed by the laws of Spain. By the provisions in the code, he is *in delay* by summons or some equivalent act; or by the effect of the agreement, when it is stipulated that the mere expiration of the term shall put him in default. By the former law, the expiration of the term without any act on the part of the creditor, or any express stipulation in the agreement, put the debtor *en mora.* Something further is, therefore, now required to be done, and when one law requires no act on the part of the creditor to confer a right, and a subsequent one does, the latter is so far contrary to the former, that a compliance with it is indispensable, otherwise, it would be without any effect whatever.

It now remains for us to consider, and dispose of the objections, which have been made to the exercise of this defence in the case before us.

First. It has been contended, that the defendant cannot take advantage of this failure on the part of the plaintiff, on the issues joined; that it should have been specially pleaded.

But the putting the debtor *en demeure* is an act which must precede the recovery. Damages, says the article already cited from the code, are *only* due after the debtor is in default. It was not, therefore, for the defendant to show he did not owe. It was the duty of the creditor to allege, or at all events to prove, these facts, without which, he had no cause of action.

Second. It has been urged, that, by the terms of the agreement, the parties bound themselves to pay all damages that either might sustain, by a failure of the other to comply with his contract. But here again, the defendant is met by the express provisions of the law, which only waives the the necessity of summons, or other equivalent act, when there is a stipulation that by the mere expiration of the term, the debtor shall be in default.

The judge who tried the cause in the court of the first instance, was of opinion, and so charged the jury, that, there being a time and place fixed by the contract for its performance, the defendant was in default without any act

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on the part of the creditor. This position is as untenable as those we have just noticed. It is true there may be contracts in which the performance, at a particular time, is so important to the creditor, and enters so much into the consideration, that a failure on the particular day fixed for its discharge, will place the debtor in default; and there may be others where performance after the day would be impossible, of which an example may be given, in an agreement to ship goods by a vessel before she sailed, and others of a similar nature. The writers who treat of this matter, properly consider questions of this kind, as of fact, rather than of law. *Cum sit magis facti, quam juris.* In the case before us, we see nothing which would authorise us to say, that the particular day was so essential to the contract that the mere expiration of the term placed the debtor in default. The place being fixed for performance offers no reason to take it out of the general rule. If the interpretation given by the court below were correct, it would follow, that in every case where a particular time was fixed for performance, the debtor would be *en demeure*; but the provision in our code, already referred to, prohibits such a construction, by declaring, that

the expiration of the term shall not put the debtor in default, unless the agreement contains a stipulation to that effect. *Code* 269, 39; *Paillette on art.* 1146 *of Nap. Code; Pothier on Ob.* 162, 146; *Toullier, droit civil Francais, vol.* 6, *lib.* 3. *cap.* 3, *no.* 250.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of non-suit, with costs in both courts.

Bowen for the plaintiff, *Simon, Brownson & Baker* for the defendant.

ABAT vs. *SEGURA.*

APPEAL from the court of the fifth district.

The issue *fraud vel non* is peculiarly of the cognizance of the jury.

MARTIN, J. delivered the opinion of the court. The defendant, sued as endorser of several notes of hand pleaded, that he was induced to endorse them by the fraud of the plaintiff; the case was submitted to a jury who found the fraud, and the plaintiff appealed.

His appeal was returned to the last term of this court and the case was remanded on a

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technical objection of his; vol. 5, 73. A second jury has found the fraud; and on a close examination of the evidence, we are unable to discover any ground on which the verdict of the jury should be disturbed. Questions of fraud are peculiarly of the province of the jury.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Simon for the plaintiff, ***Brownson*** for the defendant.

PONSONY vs. *DEBAILLON & AL.*

In a suit on an attachment bond, the plaintiff cannot give evidence of the deterioration of the property, without having alleged it.

The declarations of a party when they make a part of the *res gesta*, are evidence.

When suit is brought on an attachment bond, it is the duty of the obligee to allege & prove the damage he has sus-

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This action is brought on a bond given by the defendants to the petitioner on their suing out a writ of attachment against him. The case was dismissed, it not being one, of which the court before whom it was brought, had jurisdiction. The petition sets out the bond and the condition, and assigns several breaches or causes of damage, by which, it is averred, the plaintiff has sustained injury to the amount of

two thousand five hundred dollars, the sum for which the obligation was given.

After setting out these breaches, the petition goes on to state, as another breach of the condition of the bond, "that the writ of attachment, aforesaid, issued out in manner and form aforesaid, by the said Jean Marie Debaillon as aforesaid, was illegally and wrongfully sued out, with the intention of harassing, oppressing and injuring your petitioner; by reason of all which premises alleged, the petitioner has sustained damage to the amount of five thousand dollars; that by reason of the breaches aforesaid, alleged, and others that will be alleged, if required by the court, the said writing, obligatory, has become forfeited, and thereby an action has accrued to your petitioner, to demand and have, from the said *Jean Marie Debaillon* and *Charles Garrigues Flaujac, jr. his security*, the said sum of two thousand five hundred dollars, *the amount of said writing, obligatory*, and to have and demand from the said *Jean Marie Debaillon*, the aforesaid sum of five thousand dollars."

The petition avers further, that the defendants, though often requested, had refused to pay the amount of the bond so forfeited; and

tained by a breach of the condition.

When the plaintiff claim damages beyond the penalty in the bond, and alleges the attachment was commenced with a view to harass and oppress him, the defendant may give in evidence acts of the plaintiff which induced a belief he was about to remove the property.

And in every case the obligee in the bond may prove these facts, which produced the belief the defendant in attachment was about to leave the state.

What others said at the time, of his intention to remove, may be given in evidence.

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that Debaillon had refused to pay the five thousand dollars damage though often required so to do. It concludes with a prayer for judgment against them both, as parties to the writing, and against one of them, Debaillon, for the sum of $5000 damages.

To this petition, the defendants pleaded the general issue, and further averred, that the court where the suit had been instituted, did possess jurisdiction of the case, that the plaintiff's attorney had admitted it in his answer, and that if it did not, the error was common to all the parties to the suit. That the plaintiff was intending to defraud minors to whom he had been tutor, and the suit had been instituted against him by attachment, to defeat that purpose.

On these issues the parties went to trial in the court below, and a jury gave a verdict for the plaintiff in the sum of $1000. A motion was made for a new trial, and overruled; and judgment being rendered, in conformity, the defendants appealed.

There are ten bills of exceptions on the record; the three first were taken by the plaintiff, and an attentive consideration of them has

satisfied us, the judge below did not err in the opinions to which these exceptions are taken.

From the first bill of exceptions taken on the part of the defendants, it appears, the plaintiff offered in evidence, witnesses for the purpose of proving the situation of the real property and buildings at their seizure (under the writ of attachment) and their situation at the time they were restored to the plaintiff; to which evidence, the defendants, by their counsel, objected, on the ground that no damages had been claimed in the petition for any negligence or misconduct with regard to the real property and buildings whilst under seizure, nor for any deterioration of such property." The court, however, was of opinion that the evidence was admissible.

In support of this opinion, it has been first contended, that the plaintiff was not under any necessity of setting out the breaches; that the matter should have come by way of defence from the defendants. A reference to the terms of the bond, and a slight consideration of the nature of the case, completely answers this idea. The bond being for the payment of such damages, as the obligee may sustain, and the penal sum mentioned in it being merely to cover

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and secure these damages, it necessarily follows, the plaintiff must allege and prove what injury he has suffered. There is no other mode in which the investigation into the right could be carried on without violating first principles. Let us suppose the case, where a breach of the bond occasioned no injury to the plaintiff. The defendant could not be required to prove that no damage had been sustained, for that would be to prove a negative. In the other hypothesis, that damages had been suffered; it is surely not the duty of the person who inflicts them to allege and prove their nature and amount. By the common law of England, at one period of their jurisprudence, it was a consequence of its technicalities, that, in bonds of this kind, the obligee could, at law, recover the amount of the penalty, and the obligor was driven into equity for relief. But by a statute passed in that country in the reign of William III. the plaintiff was obliged to assign breaches, and prove them. In our system, no such rules have ever had existence, and if they ever had, good sense would have long since exploded them.

The plaintiff in this case, with great propriety, did allege in his petition, the several causes why the non-compliance of the defendants with

the condition of their bond had occasioned him damage; but we look into them in vain for that fact, which the court, notwithstanding the opposition of the defendants, permitted him to prove, in relation to the real property. The only thing that we find respecting it, is the averment that *it was seized;* and this is all the defendants could be expected to come prepared to meet. Proof that it was damaged and deteriorated in value, was, therefore, giving evidence of an injury not alleged, and was a violation of the rule that the *allegata* and *probata* must correspond.

The second bill of exceptions was taken to a refusal of the judge to admit certain acts offered in evidence, to shew, the plaintiff had, previous to leaving the state, made several fraudulent conveyances of his property; that the security given by him had become insolvent; and that efforts had been made by him to remove his property out of the parish of St. Landry, and, subsequently beyond the jurisdiction of the court. This testimony was objected to on the ground that these facts made no part of the allegations contained in the petition filed in the suit in which the attachment issued, and were not admissible in mitigation of damages.

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This objection has been very ingeniously argued in this court, but we are unable to yield our assent to it. If, as the argument assumed, the petition had been confined to an allegation of the actual injury sustained by the property of the plaintiff, from the defendant's breach of the condition of the bond, then, perhaps, the position taken would be tenable. For as the obligors, by the terms of the obligation, bound themselves to do a certain act, or pay damages for the non-performance, no matter what might be their motives for making such an agreement, they must abide by the contract they voluntarily entered into. But the petition does not stop with an allegation of injury for the breach of the bond. It alleges, that the principal in it sued out the writ of attachment with a view to harass, oppress, and injure the plaintiff; and that, by reason thereof, damages beyond those mentioned in the penalty had been sustained. When, therefore, a legal process is alleged to have been taken out from bad motives, to enhance the damages, we are clear the defendant has a right to rebut this charge, by shewing they were good.

The third bill of exceptions requires no particular notice; we think the judge did not err in

the opinion given by him. The declarations of plaintiff made a part of the *res gesta* and were properly admitted to go to the jury.

The opinion given by the judge, in relation to the matter which forms the fourth bill of exceptions, is, in our opinion, erroneous, on the principle already laid down in relation to the second. The plaintiff, with a view to show the injury suffered by him, in consequence of the seizure of his property, gave evidence he was obliged to seek refuge in the houses of his friends. The defendant offered to prove that his motives for going there were independent of any cause arising out of the attachment. This was refused; and why, we cannot conjecture. If it was competent for the plaintiff to prove the fact, and under the pleadings we have no doubt it was, it was surely open for the defendant to shew why that fact occurred. If it had a tendency to increase the damages the plaintiff claimed, the defendant had a right to mitigate those damages, by shewing it to be unconnected with the injury for which suit was brought.

The point of law involved in the fifth bill of exceptions, was, in our opinion, correctly decided by the judge *a quo*.

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The defendant offered to prove that soon after the plaintiff's departure for France, a witness called at the house where he had lived, and was informed by a member of his family, that she did not know where he was gone; and that the witness communicated this fact to the defendant Debaillon. The plaintiff objected to this proof, because it was hearsay, and that the member of the family ought to be produced. The judge being of the same opinion, his decision, rejecting the testimony, forms the ground of the sixth bill of exceptions

Our attachment law requires the plaintiff to swear to his belief of facts in relation to the defendant, which must be ascertained, by enquiries into all the circumstances of his departure—his declarations to others—and by common report. When the correctness of the plaintiff's proceedings subsequently became a subject of investigation, he had a right to give in evidence all these circumstances; and all the declarations, either of the defendant or others, from which the belief was formed, in relation to the removal contemplated, or effected by his debtor, and the motives of that removal. The testimony, therefore, offered in this case, should have been admitted. The

objection is, that the woman is the best witness and should have been called; but we think differently. If the evidence offered had been in relation to any fact within that woman's knowledge, she certainly ought to have been produced, and what she said respecting it would not be the best evidence. But whether she told the truth or not, that which she stated was a circumstance, with others, to go to the jury, to shew under what impressions the plaintiff acted: and of her declarations those who heard her, were as good witnesses as she could be.

The 7th bill of exceptions has been abandoned before this court: the opinion stated in it, to be given by the judge, was clearly correct.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed: and it is further ordered, adjudged, and decreed, that the cause be remanded for a new trial, with directions to the judge *a quo* not to admit testimony of the injury done to the real property; and not to reject evidence such as that stated to have been offered by the defendants

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in the second, fourth, and sixth bills of exceptions taken by them, on the trial of this cause. And it is further ordered, adjudged, and decreed, that the appellee pay the costs of this appeal.

Simon and *Garland* for the plaintiffs, *Lesassier* and *Brownson* for the defendants.

HOWE'S HEIRS vs. *BRENT.*

Claims for the professional services of an attorney are barred by the lapse of three years since the services were rendered.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The defendant, sued for money had and received to the ancestor of the plaintiff's use, pleaded as a set-off, an account for professional services, and money expended. There was judgment against him, and he appealed. His only complaint in this court, is that the judgment rejects an item of $500, in his account. This sum was demanded as a compensation for his services, in procuring the divorce of the deceased. The plaintiffs did not deny the performance of these services, nor complain of the charge as an extravagant one; but opposed to it the statute of limitation: three years have elapsed since the divorce was

obtained, at the time the defendant received the first sum of money, to the use of their ancestor, now claimed.

Claims for the compensation of attorneys, are barred by the expiration of three years after the services rendered. *Morse* vs. *Brand*, vol. 2. In the present case, more than three years had elapsed, not only at the period of the service of citation, but at the time when the first item in the plaintiff's claim, rendered the defendant the debtor of their ancestor. The plea of the statute of limitations, was accordingly, properly sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Isaac L. Baker & Joshua Baker, for the plaintiffs, *Simon* for the defendant.

M'MICKEN vs. *BRENT.*

APPEAL from the court of the fifth district.

The general issue is waived by the plea of payment.

PORTER, J. delivered the opinion of the court. The petitioner states that he placed in the hands of the defendant, an attorney at law,

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two claims, one, against David Weeks, and the other, against John Muggah, and that he has collected from them the sum of $819 50 which he refuses to pay over.

The defendant pleaded the general issue, and payment, a set-off of $100 for his fee, in prosecuting the suit against Muggah, and ten per cent. on the sum recovered against Wheeler.

The court below, gave judgment in favor of the plaintiff, for $256 75. The defendant appealed

One of the principal objections to the correctness of this judgment, arises out of an exception taken on the trial, to admit the claim against Weeks, because, the evidence shews, that it was not put in the defendant's hands, by the plaintiff, as alleged in the petition, but by one Wheeler, who afterwards transferred it to the plaintiff.

We are of opinion this objection cannot avail the defendant, because, the plea of payment, in the answer, waives the general issue, and admits the facts as alleged.

Another objection is, that the defendant allowed interest improperly, on a note he received in payment from Muggah, on which he, the defendant, was indorser. If he did, his re-

medy is against Muggah. It is proved he allowed a credit for it against the plaintiff's claim, and whether, correctly or not, he became responsible to the plaintiff the moment that credit was given.

The pleadings in this court, do not shew the plaintiff to have required the judgment to be amended in his favor; and the objection made to it in his argument, cannot be noticed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be affirmed with costs.

Baker for the plaintiff, *Simon* for the defendant.

DELAHOUSSAYE vs. *JUDICE.*

A judgment does not give to the plaintiff the plea *rei judicatæ*, as to a claim of the defendant against the plaintiff, existing before the judgment, when the claim was not pleaded in compensation

Every act, in which the word *donation* is used, is not necessarily a donation

APPEAL from the court of probates of the parish of St. Martin.

MATTHEWS, J. delivered the opinion of the court. The object of the present action is to recover sums of money, which the plaintiff claims as a creditor of the succession of her late husband. The petition contains an allegation, that a certain instrument, made by the plain-

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tiff, under private signature, and purporting to be a donation of $901, is absolutely void in law, &c.

The judge of the court below, after liquidation of the accounts of the parties to the suit, rendered judgment in favor of the plaintiff for $552, from which the defendant appealed.

The pleadings and evidence of the cause shew, that a suit had existed in the district court, commenced by the present defendant, against the plaintiff, which was prosecuted to final judgment; in which, the counsel for the defendant in this action insists, that all the matters now in dispute, were finally settled. the ground on which they rely for this plea *rei judicatae* is, that, the cause of action now set forth existed at the time of the former suit. It does not appear that they were pleaded in compensation or in any other manner; the defendant in the former suit might have thus pleaded, and had he done so, the judgment pronounced by the district court, would probably have precluded the present pursuit. But as they were not taken into consideration in that judgment, it creates no bar to this demand.

The nullity of the act, purporting to be a do-

nation to the pupil and daughter of the appellant, is strenuously contended for; and in support of his positions, the counsel refers us confidently, to the text of the law on the subject of donations, and several commentators. These authorities, it is believed, would maintain the plaintiff in his pretentions, were the instrument to be considered absolutely as a donation: although the word *donation* is used in the act, yet taken according to the evident intentions of of the party, as reciprocally expressed by the whole context of the instrument, we are of opinion that it evidences a compromise of difficulties, and mutual releases. The judge *a quo* in deciding the cause, properly recognised the validity of this act.

It is therefore ordered, &c. that the judgment of the court of probates be affirmed, with costs.

Simon for the plaintiff, *Baker* for the defendant.

LE BLANC & AL. vs. *VIATOR & ALS.*

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the

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court. This is an action of trespass for cutting timber in the cypress swamp of the plaintiffs.

The defendants pleaded the general issue, and that they are proprietors and reside on large tracts of land granted more than thirty years ago, by the Spanish government, to Francis Legura, and other emigrants from Spain to Louisiana, to whom the said cypress swamp was granted in common—and the defendants as heirs or vendors of the said emigrants, are entitled to cut and carry away cypress trees in said swamp, for the use of their respective plantations—they pleaded the prescripts of thirty, twenty and ten years.

Vacant lands do not generally pass without a written grant.

But to this there are exceptions.

In an action of trespass for cutting timber, the measure of damages is the value of the timber destroyed considering its distance from other timber.

Parol evidence cannot be received of an alleged practice of Spanish surveyors, to exclude swamps in surveying land granted in the Attakapas.

There was a verdict, and judgment against them, and they appealed.

Our attention has been called to several bills of exception.

1. The first is to the opinion of the court, refusing to permit parol evidence to be given, that the *locus in quo* was assigned to the Spanish emigrants to Nova Iberia, by the commandants, and agents of the king of Spain, to afford them building timber—except to prove possession in support of the plea of prescription.

2. The next was to the charge of the court,

that if the jury allowed damages, they should confine themselves to trespasses committed after notice of the plaintiff's title and before the inception of the suit, taking into consideration the defendants' good faith, and if the jury believed the defendants had trespassed after notice, the measure of damages should be the real value of the timber destroyed, considering the plaintiff's situation.

3. Another was to the rejection of Johnston, the surveyor appointed by the court, who was offered as a witness to prove that part of the survey, by him returned, was accurately taken from the field notes, of another survey made by him, in 1814, under the authority of the U. S.

4. Another, was to the admission of the same person to prove, that the survey returned to this court, was returned by him, to the office of the principal deputy surveyor, and approved by the latter.

5. A fifth was to the rejection of parol evidence, that during the latter part of the Spanish government in Louisiana, no grant of cypress land was made in the Attakapas, by the governor and commandants—that surveyors, in laying out new grants, stopped at cypress

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swamps, in running back, and the general understanding among the officers of the king and his other subjects, was, that the cypress timber not theretofore purchased, was reserved to the people of Attakapas, in common.

6. Another, was to the permission given by the court to the plaintiff's counsel, to ask one of these witnesses, "What was, in his opinion, the diminution in value of the property in dispute?" considering its situation and remoteness, from other timber, in consequence of the waste committed by the defendants.

7. The last was to the refusal to admit in evidence, a book, in which were entries of supplies, by the Spanish government, to Jerome Ganido, a Spanish emigrant.

I. It is true, as a general principle, that patent lands do not pass without a written grant, but to this there are exceptions.

In the case of *Gonzalez* vs. *Sanchez & wife*, we held that a Spanish emigrant, placed by government on the bayou La Fourche, needed not to produce a grant to establish his title, to the land on which he had been located; and it is sufficient that he should establish by parol testimony, that the king's officers had placed him thereon, and designated the metes and

bounds of his land; and we stated the ground of this opinion, 11 *Martin*, 207. We see no reason to be dissatisfied with it. If after locating 120 settlers, of Nova Iberia, the officers of Spain, assigned a neighboring swamp in the neighborhood, as a place, the lumber of which they were to enjoy in common—we are unable to say that this assignment to all cannot be proven by parol, while the assignment of a tract to each individual may. We think the court erred in the opinion to which the first bill of exception was taken.

II. It does not appear to us that the defendants were injured by charge of the court—the measure of the plaintiff's damages, if any were done, was certainly the actual value of the timber, considering its distance from other timber.

III. & IV. The surveyor having made his return, and filed his plot, it was unnecessary to ask him any question as to the manner in which it had been effected—and it could derive no additional validity from its conformity to another plan, filed in the office of the deputy attorney general of the U. S. and approved by that officer.

V. Parol evidence was properly rejected

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of the alleged practice of Spanish surveyors, in excluding swamps, in surveying lands granted in the Attakapas.

VI. The district court did not, in our opinion, err in allowing the plaintiffs to ask a witness, what was the diminution in value of the *locus in quo*, (by the waste committed on it) considering the distance of other timber.—For the solution of this question was necessary to a just assessment of damages according to the rule we have laid down, in considering the second bill of exception.

VII. The book of Jerome Ganido, between whom, and either of the parties, there appears no connection—cannot be evidence for the defendants. The circumstance of his having been an emigrant like them, and having received supplies from the royal stores, are of no use in deciding the present case.

It is therefore, ordered, ajudged, and decreed, that the judgment of the district court, be annulled, avoided, and reversed, the verdict set aside, and the case remanded to the district judge, directed to allow parol evidence of the assignment of the *locus in quo*, as a common to the settlers—and that the plaintiffs and appellees pay costs in this court.

Simon & Brownson for the plaintiffs, *Baker & Bowen* for the defendants. Western Dis *Sept*, 1827

BROUSSARD vs. *DECLOUET.*

APPEAL from the court of the fifth district.

A bailment of cotton to be ginned is for the mutual benefit of the parties, and the bailee is bound to use that care which prudent men bestow on their own concerns.

MARTIN, J. delivered the opinion of the court. The plaintiff charges that the defendant received a quantity of seed cotton from the plaintiff to be ginned and baled; and not minding his promise to deliver it ginned and baled, has refused to do so. Further, that he, the plaintiff, delivered to the defendant a quantity of cotton in the seed to be ginned and baled, and the defendant promised faithfully to keep the same for the plaintiff; notwithstanding which, he so carelessly kept the same, that it was destroyed and consumed by fire through his negligence and carelessness. It is averred that the defendant was to receive compensation for ginning, baling, and taking care of the cotton.

The defendant pleaded that the plaintiff's cotton was destroyed by fire, with the gin, ginhouse, and other property of the defendant's by a fortuitous and uncontrolable event, over which he had no power, and which he could not

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have prevented by any care, prudence or foresight. Prescription was also pleaded.

There was judgment for the defendant, and the plaintiff appealed.

At the trial the plaintiff objected to the introduction of testimony to prove the destruction of the cotton by an accidental fire; contending that the defendant should be confined to evidence of a destruction by fire; "by a fortuitous and uncontrolable event, over which, the defendant had no power, and which he could not have prevented by any care, prudence, or foresight," as stated in the answer. The plaintiff's objection was overruled, and he took a bill of exceptions.

We are of opinion the district judge did not err; proof of an accidental fire was an *incipient* proof of the fire alleged in the answer, which was to be completed by evidence of other circumstances.

The bailment of the cotton to the defendant being for the common advantage of the bailor and bailee, the latter was bound to use that care, diligence, and attention which prudent men use in their own concerns; and the defendant has maintained his allegation if the fire which consumed the plaintiff's cotton was the

result of an accident which he could not prevent by the care, prudence, and foresight which prudent men use in their own concerns. This was a mere question of fact, and the district judge who heard the testimony from the lips of witnesses, has concluded that such care, prudence, and foresight had been taken. We have carefully examined the evidence, and it appears to us completely to justify the conclusion at which the district judge arrived.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Bowen for the plaintiff, *Baker & Brownson* for the defendant.

GRIFFITH vs. *TOWLES.*

APPEAL from the court of the fifth district.

The transfer or assignment of a judgment written on the official copy of the record, must be proved, as an act *sous seing privé.*

MATTHEWS, J. delivered the opinion of the court. This action is instituted on an assignment of a judgment obtained in the state of Mississippi against the defendant by Elizabeth M. Dangerfield, executrix of the last will of H. Dangerfield.

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The record of the judgment and the assignment was received as evidence in the court below; and judgment was rendered in favor of the plaintiff; from which the defendant appealed.

The case comes upon a bill of exceptions taken to the admissibility of the documents received in evidence, as above stated. That part of the exception which relates to the record, need not be noticed; as we are of opinion that the assignment was improperly admitted. It is an act under private signature, and ought to have been proven before it was received in evidence.—This was not done.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed, and annulled; and that the cause be awarded to said court, to be tried *de novo*, with instruction to the judge, not to admit in evidence, the assignment of the judgment offered in the cause, without proof of its execution; and that the appellee pay the costs of this appeal.

Baker for the plaintiff, *Brownson* for the defendant.

MASSE'S HEIRS vs. *PIERRE & AL.*

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It is a fatal objection to a will offered as an authentic nuncupative one, that no mention is made of its having been written by the notary. On the allowance of the objections, the court will not reserve to the party offering it, the faculty of presenting it as a nuncupative will by private act.

APPEAL from the court of the fifth district.

PORTER, J. delivered the opinion of the court. This is an action by the legal heirs of one Magdelaine Masse, f. w. c. claiming from legatees under an alleged will of the deceased, certain property in their possession. Their right to it depends, entirely on the validity of a testament made by public act.

Various objections have been made to the legality of this instrument, none of which we deem necessary to notice, except that which relates to the want of mention that it was written by the notary. This we consider a fatal defect. The 92d. art. of the old code, page 228, requires, for the validity of a nuncupative will, by public act, that it must be signed by the testator and written by the notary as it is dictated, and that express mention must be made that it was so signed and written. There is no such statement in the will before us, and the want of this formality is declared, by another article of the code to be cause of nullity. *Merlin Repertoire, verbo testament*, 673, 680. *Toullier*,

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droit civil Francais, vol. 5; *l*. 3; *lib.* 2; *chap.* 5; *art.* 417, 425; *c. code*, 232, *art.* 108.

The defendants have prayed us to reserve them the right to shew hereafter, in another suit, that this will was good as a nuncupative testament, by private act; but this request cannot be granted. It was set up by them as their title, and if it was good in any shape, it was their duty to establish it. A bill of exceptions taken on the trial, shows the plaintiff expressly contested it on the ground that we are now called to reserve for further litigation. The judgment below is sufficiently favourable to the defendants in allowing them to contest, hereafter, with the plaintiffs, the validity of the will, in case it is brought in question in relation to the other property left by the testatrix.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Davis & Bowen for the plaintiffs, *Brownson & Simon* for the defendants.

DAVIS' HEIRS vs. *PREVOST.*

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APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. This case came to this court several years ago; the pleadings are stated in 12 Martin; and after several arguments, on a suggestion that further evidence was in the power of the parties, the case was remanded, with their consent, for another trial. There has been a verdict and judgment for the defendants, and the plaintiffs have appealed. Vol. 1, 697.

A defendant may pray for a jury, in an amended answer; but it is in the discretion of the court to permit it to be filed.

When his real object is to have his case tried by a jury, he should be indulged, if delay is not thereby created.

The court is to judge of the *admissibility* of the evidence, and cannot discharge itself from this obligation by transferring it to the jury.

The counsel for the appellants has called our attention to several bills of exceptions.

1.—When the cause was called for trial in the district court, the counsel for the defendants presented to the court a petition, in which they prayed for a jury; the application was refused on the ground that it was too late, and the jury ought to have been prayed for in the answer. The court, however, directed the cause to be tried by a jury; and the plaintiff took a bill of exceptions.

A defendant may, in proper time, pray for a jury, on an amended answer, but it is always in the discretion of the court to grant leave to file

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it; it will be denied if the trial be thereby unnecessarily delayed. In the present case, the judge has certified that a jury was in attendance when the petition was presented. When a party's real object is to have his cause tried by jury, he ought to be indulged, when his application causes no delay. Indeed, the court may itself direct one, *ex officio*. It does not appear to us that the court erred.

2.—The plaintiffs objected to the introduction of the testimony of Louis Vellieon and others, for any other purpose than to prove possession in the defendants, because, as they had admitted they had a written title, they could not be allowed to prove a verbal one; neither could they be allowed to prove an assessment for a payment of taxes by parol. The objections were overruled, and the plaintiffs took a bill of exceptions.

The judge states that he considered the parol testimony good to prove, 1st. the existence and loss of a title; 2d. possession; 3d. any circumstance from which a title may be presumed, such as acts of ownership, payment of taxes, general reputation of title, &c. 4th, prescription.

We think the court erred. The evidence

was admitted *absolutely;* now the court is to judge of the *admissibility* of testimony, and cannot discharge itself from this obligation by transferring it to the jury; and must be satisfied that the best evidence cannot be had, before it admits inferior.

3.—The plaintiff claims immediately under deeds from the heirs of Delahoussaye, to whom the premises were transferred by the heirs of the original grantees, whose deed recites that they convey in consequence of an exchange heretofore made by their ancestors, with Delahoussay. The defendants offered in evidence, an affidavit of Delahoussay, filed before the land commissioners of the U. S., in which he declares that the premises belong to the ancestors of the defendants' warrantees. The introduction of the affidavit was opposed by the plaintiffs' counsel; the objection overruled, and a bill of exceptions taken.

The heirs of Delahoussaye derived their title immediately from the heirs of the grantees; and the deed by which they acquired it is alleged to be fraudulent and void, inasmuch as the fact alleged as the inducement to the transfer does not exist; that the recital is false. Strangers to a deed may attack it when they

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shew covin and collusion for the purpose of defrauding them, between the parties. If the defendants claim under the original grantees, or their heirs, by a conveyance anterior to that under which the plaintiffs claim, the deed they attack is not in their way, and the destruction of it will not better their title. If the heirs of the original grantees have been deceived, and their conveyance obtained by fraud, they may be relieved, but while they are silent, a stranger to the deed can only attack it on the allegation of collusion.

We are of opinion the court erred.

4.—The affidavit of Delahoussaye being rejected, it is useless to enquire whether the court did err in refusing parol evidence to be introduced to disprove the facts alleged in a deed of exchange between the ancestors of the original grantees and Delahoussaye.

5.—As the opinion we have expressed on the introduction of evidence makes it our duty to disregard the verdict, it is useless to examine the bill of exceptions taken to the charge to the jury.

The district court having admitted illegal evidence, it follows that the judgment must be reversed, and the verdict set aside. In such

circumstances, our uniform practice is, to remand the case to be acted on by a new jury; but the parties have pressed us to proceed to the examination of the evidence; and, disregarding the testimony illegally received, determine the case on its merits, and act upon it as if no jury had been prayed.

It would have been more agreeable to us to have remanded the case, and we had believed that the variety of facts to be examined, some contrariety in the testimony, rendered this case more proper for the decision of the facts on which it rests, by a jury than by us; but the case has, for a great number of years been before us, and both parties are anxiously desirous of immediate decision.

We have, therefore, carefully examined the evidence, and it does appear to us that what has been added to it since the case was remanded, does not materially alter it. Indeed, the evidence varies very little from that in the case of Prevost's heirs vs. Johnson, 9 *Martin*, 123.

We conclude then, the plaintiffs have fully established their title to the premises, and that the defendants have failed to prove any in themselves, or to establish such possession in themselves, and those under whom they claim, as will avail them under the plea of prescription.

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It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; that judgment be entered for the plaintiffs against the defendants; and for the latter against the party called in warranty; and the case be remanded to the district court, for the assessment of damages for the present defendant, and that the plaintiffs recover their costs in both courts.

Brownson for the plaintiffs, *Baker* for the defendants.